

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VALSAMMA P. CHERIAN and DEPARTMENT OF VETERAN AFFAIRS,
MEDICAL CENTER, Northport, N.Y.

*Docket No. 97-1858; Submitted on the Record;
Issued March 25, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits pursuant to 5 U.S.C. § 8106(2) on the grounds that she refused suitable work.

On January 27, 1995 appellant, then a 44-year-old nurse, filed a notice of traumatic injury alleging that she suffered a herniated nucleus pulposus of the cervical spine on December 10, 1994 in the course of her federal employment.

On August 7, 1995 the Office accepted the claim for herniated disc C6-7 and appellant received compensation for total disability.

On November 6, 1995 the Office requested that Dr. William Healy, Jr., a Board-certified orthopedic surgeon, provide a second opinion examination.

On November 29, 1995 Dr. Healy reviewed the history of appellant's injury and the treatment she received, including her cervical discectomy and fusion at the C6-7 level. Dr. Healy reviewed appellant's x-rays and conducted a physical examination. He noted that appellant's neck demonstrated a full range of motion in left and right rotation, flexion and extension and left and right bending. He noted, however, that appellant complained of discomfort at extremes with these maneuvers. Dr. Healy stated that these symptoms should gradually decrease and that appellant would then be able to carry out her full duties. He opined that appellant should avoid heavy lifting or bending for two months, but that otherwise she was capable of returning to her normal work, eight hours per day.

On December 6, 1995 the Office requested that Dr. John Labiak, appellant's treating physician and a Board-certified orthopedic surgeon, respond to Dr. Healy's opinion.

On December 20, 1995 Dr. Labiak completed an attending physician's supplemental report. He diagnosed a herniated nucleus pulposus status post anterior cervical discectomy/fusion. Dr. Labiak checked "no" to indicate that appellant was not able to resume her regular work. He also recommended further physical therapy and no lifting, bending, or

twisting. Dr. Labiak repeated this opinion on January 23, 1996. On January 25, 1996 Dr. Labiak indicated that appellant could not return to her full duties.

On February 21, 1996 the employing establishment offered appellant a limited-duty position. The position was described by an uncompleted performance appraisal form which did not describe the physical components of appellant's new job, except to note that she would not be required to bend, twist or lift.

On August 2, 1996 Dr. Labiak indicated that appellant could return to work on a restricted basis, but that she could not bend, twist or lift.

On February 29, 1996 appellant rejected the limited-duty job offer on medical grounds.

On March 8, 1996 the Office informed appellant that it determined the limited-duty job offer was suitable. The Office allowed appellant 30 days to either accept the position or provide an explanation for refusing it. The Office informed appellant that if she refused the limited-duty job offer, she would not be entitled to compensation pursuant to 5 U.S.C. § 8106(2).

On March 14, 1996 Dr. Labiak checked "yes" to indicate that appellant's disability for regular work would continue for 90 days or longer.

In a letter dated April 11, 1996, the Office again indicated that it found that the limited-duty job offer was suitable and within appellant's medical restrictions. The Office indicated that appellant's benefits would be terminated within 15 days if he refused this employment or failed to report to work when scheduled.

By decision dated April 29, 1996, the Office terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c) because appellant refused suitable work.

On August 2, 1996 Dr. Labiak indicated that appellant could return to work on a restricted basis, but that she could not bend, twist or lift.

On October 31, 1996 appellant requested reconsideration. In support, appellant submitted a copy of the previous decision, a copy of the limited-duty job offer and employing establishment records documenting the termination of compensation benefits. Appellant also submitted a September 6, 1996 opinion from Dr. Labiak. Dr. Labiak reviewed the history of appellant's injury and noted that in his initial consultation appellant demonstrated a markedly restricted range of motion of her cervical spine in extension as well as lateral rotation and the combined motions of lateral rotation and extension to the right. Dr. Labiak reviewed x-rays and diagnosed cervical spondylosis and acute cervical herniated nucleus pulposus with predominant C6 radiculopathy. Dr. Labiak indicated that continuing pain resulted in surgery on January 23, 1995 consisting of an anterior cervical discectomy and fusion C6-7. He stated that after the surgery appellant was advised to avoid bending, twisting and lifting. Dr. Labiak indicated that he last examined appellant on April 3, 1996. He noted that appellant complained of neck pain, right upper extremity pain and numbness, some intrascapular pain and left shoulder pain and occipital headaches. Dr. Labiak indicated that he reviewed appellant's magnetic resonance imaging, her computerized axial tomography and her myelogram. He stated that the myelogram showed residual spondylosis which caused her symptoms. He stated that this was directly related to appellant's accepted injury. Dr. Labiak indicated that appellant should avoid repetitive bending and twisting. He stated that appellant should also avoid lifting, prolonged postures

including prolonged reading or writing, prolonged sitting or driving or use of a computer terminal. He concluded that appellant could not perform the duties of any job offered.

By decision dated February 3, 1997, the Office reviewed the merits of the case and determined that the evidence submitted in support of the request for reconsideration was not sufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office indicated that the opinion of Dr. Healy outweighed the opinion of Dr. Labiak because the former physician's opinion was well rationalized.

The Board finds that the Office did not meet its burden in terminating appellant's compensation.

In the instant case, the employing establishment's limited-duty job offer consisted of an incomplete performance appraisal with the notation that appellant would not be required "... to lift, bend, or twist." The employing establishment did not describe the specific physical components of appellant's limited-duty position. The Office's procedure manual, however, states that, *inter alia*, an offer of light duty must be in writing and must include the specific physical requirements of the position and any special demands of the work load or unusual working conditions.¹ Because the employing establishment failed to describe the specific physical requirements of its limited-duty position, the February 21, 1996 job offer was not valid. Accordingly, the Office erred in terminating appellant's compensation benefits based on this offer.

The decisions of the Office of Workers' Compensation Programs dated February 3, 1997 and April 29, 1996 are reversed.

Dated, Washington, D.C.
March 25, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814(4)(a)(1)(b).